IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 411 of 2001

For Approval and Signature:

THE HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE MR.JUSTICE H.B.ANTANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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MANSUKHBHAI LAVJIBHAI - Petitioner(s)

Versus

STATE OF GUJARAT - Respondent(s)

========== **Appearance :**

MR BS SUPEHIA for Appellant.

MS HANSA PUNANI, APP for Respondent.

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CORAM :THE HON'BLE MR.JUSTICE J.M.PANCHAL

AND HON'BLE MR.JUSTICE H.B. ANTANI

Date : 23/06/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE H.B.ANTANI)

The present appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973, against judgment dated April 30, 2001 passed by the learned Additional Sessions Judge, Rajkot, in N.D.P.S.Case No.104 of 2000 whereby the appellant is convicted of the offence punishable under Section 21 of the Narcotic Drugs and

Psychotropic Substances Act, 1985 [“the NDPS Act”] and sentenced to suffer R.I. for a period of ten years and a fine of Rs.1 Lac, in default, R.I. of one year.

1.An information was received by A.S.I. Mr.Keshubhai Mepabhai discharging duties in D.C.B.Rajkot on 7.4.2000 at 16.30 hours that one person named Mansukhbhai Lavjibhai, wearing white pant and black and red coloured shirt, was in possession of charas, and selling the same near Ranchhoddasji Ashram located on Kuvadva road, Rajkot. The A.S.I. Conveyed the information received by him to Mr.B.V.Jani, who then was P.S.I. Of D.C.B. Rajkot. Mr.Jani, accordingly informed Police Control Room and Deputy Commissioner of Police. Further, the A.S.I. Also informed Mr.Baranda, who was P.I., DCB, Rajkot and after requisitioning services of panch witnesses, prepared the first part of panchnama. On the strength of the information received, a raid was carried out on Kuvadva road on 7.4.2000 and when the appellant was accosted, he was found in possession of charas weight of which was found to be 216 grams worth Rs.6480/- approximately. The raiding party went to the place indicated in the information. On reaching place situated on Kuvadva Road and on confronting the appellant, name of the appellant was asked and subsequently he was informed that as he was, as per the information, in possession of contraband article, search was required to be carried out of his person. He was also informed that he could be searched in the presence of a gazetted officer or a magistrate if so desired. However, the appellant did not express desire to be so searched. Thereafter search of the person of the appellant was carried out and on the search being carried out of his person, one small plastic bag was recovered from left hand side pocket of his pant containing dark-brown material. On smelling, the substance found from the possession of the appellant was ascertained to be charas. An arrangement was also made to call a Goldsmith to weigh the muddamal which was recovered from the possession of the appellant, and after weighing the muddamal article, its weight was found to be 216 grams. It was subsequently placed in a plastic bag and the plastic bag was sealed in the presence of panch witnesses. The signatures of panch witnesses were also obtained on the slip which was placed with the plastic bag. On the search of person of the appellant, xerox copy of railway-receipt and one certificate issued by Rajkot Hospital were also recovered and the same were also seized. Tricycle, on which the appellant was traveling, was seized during the course of raid. The seizure-memo was prepared and thereafter the appellant was detained. The grounds of detention were supplied to the appellant and the thumb

impression of the appellant was taken thereon. Thereafter the complaint was lodged by Mr.B.V.Jani, Police Sub Inspector. The sample of muddamal article, which was recovered during the course of raid, was placed in a separate plastic bag and it was sealed for sending the same to Forensic Science Laboratory ['F.S.L.' for short] for the purpose of detailed analysis. The investigating officer recorded statements of witnesses during the course of investigation. On receipt of report from F.S.L. and on completion of investigation, the appellant was charge sheeted for the offence punishable under Section 22 of the NDPS Act in the Court of learned Sessions Judge, Rajkot. The case was thereupon numbered as Sessions Case No.104 of 2000.

1.Ms. Hansa Punani, learned A.P.P. For the State submitted that the information conveyed to the appellant produced by prosecution at Exh.12 should be treated as sufficient compliance of Section 50 of the Act in view of decisions of the Supreme Court in cases of **(1) Prabha Shanker Dubey v. State of Madhya Pradesh, 2003(8), Supreme To-day, 565, (2) Smt. Krishna Kanwar alias Thakuraeen v. State of Rajasthan, 2004 AIR SCW 1203**, which are rendered after considering **Baldev Singh's** case relied on by the learned counsel of the appellant. In answer to second submission, it was argued that the conviction of the appellant under Section 21 of the Act should be substituted to one punishable under Section 20 of the Act notwithstanding absence of charge under Section 20 of the Act, as the appellant has failed to establish that it would occasion prejudice to him as contemplated by section 465 of the Code of Criminal Procedure. The learned Advocate of the State contended that the two points urged at the Bar on behalf of the appellant have no substance and the appeal should be dismissed.

8. We have perused the entire oral depositions as well as documentary evidence which has been relied upon by the prosecution and discussed by the learned Additional Sessions Judge in his judgment. If we peruse the provisions contained in Section 50 of the NDPS Act, then it becomes clear that when any officer duly authorised, is about to search any person, he shall, if such person so requires, take such person to the nearest gazetted officer or a Magistrate. On perusal of the evidence, which is relied upon in the present case and more particularly the evidence adduced by Mr.Jani recorded at Exh.6 and that of Mr.Chandubhai Shanabhai Baranda recorded at Exh.41, it becomes clear that meticulous care was taken while conducting search of person of the appellant and he was informed that he could be taken to a gazetted officer or a magistrate for search. On perusal of deposition by Mr. Jani and Mr.Baranda, aforesaid aspect gets reflected and it gets necessary corroboration from the documentary evidence such as

information which was given to the appellant by P.S.I. DCB, Rajkot vide Exh.12. On perusal of the same, it becomes clear that the appellant was informed and made aware of his right to have search in the presence of a gazetted officer or a magistrate. The report which was forwarded to the higher officer by the P.S.I. DCB, Rajkot also mentions that the appellant was informed that he could be taken to a gazetted officer or a magistrate for search. In view of aforesaid facts and circumstances of the case, the question arises whether provisions of Section 50 of the Act stand complied with. While dealing with this plea, this Court finds that in **State of Punjab (supra),** the Supreme Court, in Para-55 of the reported decision, has observed as under :

"*55. On the basis of the reasoning and discussion above, the following conclusions arise :*

1. *That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;*
2. *That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;*
3. *That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;*
4. *That, there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important, but the means to*

achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

5. *That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue one way or the other, would be relevant for recording an order of conviction or acquitttal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.*
6. *That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;*
7. *That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.*
8. *A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.*
9. *That the judgment in Pooran Mal's case (AIR 1974 SC 348) cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence on unlawful possession of the illicit article on the person*

from whom the contraband has been seized during the illegal search;

10. *That the judgment in Ali Mustaffa's case (1994 AIR SCW 4393 : AIR 1995 SC 244) correctly interprets and distinguishes the judgment in Pooran Mal's case (AIR 1974 SC 348) and the broad observations made in Pirthi Chand's case (1996 AIR SCW 422 : AIR 1996 SC 977 : 1996 Cri LJ 1354) and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mali's case.*

The aforesaid decision has been considered by the Supreme Court in **Prabha Shankar Dubey v. State of Madhya Pradesh, 2003(8) Supreme Today 565.** In the said decision, the Apex Court has held, "It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under section 50. It is further held therein that what is necessary is that the concerned accused should be made aware of the existence of his right to be searched in presence of one of the officers named in the Section itself. According to the Supreme Court, since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. It is held that whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula. The Supreme Court has ruled that Section 50 does not involve any self-incrimination and it is only a procedure required to protect the rights of an accused being made aware of the existence of his right to be searched if so required by him before any of the specified officers.

In the said case, the information was conveyed in the following manner :

"*By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any gazetted officer or by a magistrate*."

In response to the aforesaid intimation, each of the accused gave in writing as follows :

"Sir, I have no objection, if you search me or my scooter"

After referring to the decision of the Supreme Court in **State of Punjab v. Baldev Singh (supra)**, the Supreme Court has held as under :-

"10. The notice in the present case has great similarity with what was conveyed to the accused in Joseph Fernandez v. State of Goa [2000(1) SCC 707]. It was inter alia held in the said case as follows :

'2. Learned counsel tried to highlight a point that Section 50 of the Act has not strictly been complied with by PW-8, the officer who conducted the search. According to the learned counsel for the appellant the searching officer should have told the person who was subjected to search that he had a right to be searched in the presence of a gazetted officer or a magistrate. In this case, PW-8 has deposed that she told the appellant that if he wished he could be searched in the presence of the gazetted officer or a magistrate to which the appellant had not favourably reciprocated. According to us, the said offer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that 'if you wish, you may be searched in the presence of a gazetted officer or a magistrate.' This, according to us, is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act'. (Underlined for emphasis).

Though, learned counsel for the appellants submitted that this was a case where the Court erroneously held that substantial compliance would be sufficient, we find that the underlined portion is what was held by the Court to be information of the right. The offer in the present case is almost a replica of what was said in that case.

1.Though there cannot be any quarrel with the general principle highlighted by learned counsel for the appellants that if a thing is required to be done in a particular way, it should be done in that way, the position here is different in view of our conclusions that the requirements of Section 50 of the Act were sufficiently complied with. The general principle as noted has been stated illuminatingly in Nazir Ahmad v. King-Emperor (AIR 1936 PC 253), and later by this Court in State of Uttar Pradesh v. Singhara Singh &Ors. (1964(4) SCR 485). What the concerned officer is required to do is to convey about the choice the accused had. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the concerned officer, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh's case(supra) seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given, but more by way of a right in the 'subject' at that stage to be given such a choice

and the inevitable consequences that have to follow by transgressing it.

12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh's case (supra). A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

9. Again, in **Smt. Krishna Kanwar @ Thakuraeen vs. State of Rajashtan, 2004 AIR SCW 1203**, the Supreme Court had occasion to consider the provisions contained in Section 50 of NDPS Act. In the said case, accused was intimated of his option and choice and the existence of his right of being searched by police officer himself or by a gazetted officer. A plea was raised that provisions of Section 50 were not complied with. While negativing the said plea, the Supreme Court has observed as under in Paras 19 to 24 :-

"*19. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See: Kalema Tumba v. State of Maharashtra and another, (JT 1999(8) SC 293), Baldev Singh's case (supra), Gurbax Singh v. State of Haryana, (2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra).*

1.In order to appreciate rival submissions, some of the observations made by the Constitution Bench in Baldev Singh's case (supra) are required to be noted. It is also to be noted that the Court did not in the abstract decide whether Section 50 was directory or mandatory in nature. It was held that the provisions to the Act implicitly make it imperative and obligatory and cast a duty on the investigating officer (empowered officer) to ensure that search of person (suspect) concerned is conducted in the manner prescribed by Section 50 by intimating to the person concerned about the existence of his right that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit articles suspect and vitiate the conviction and sentence of the accused. Where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act, it was illegal. It was

further held that the omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. In paragraph 32 of the judgment (at page 200) this position was highlighted. In para 57, inter alia, the following conclusions were arrived at :

'(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of the Act of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory , but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50 and render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in

Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

2. *It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the Section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula.*

3. *Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused (suspect) being made aware of the existence of his right to be searched if so required by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused (suspect) does not take a plea that the articles were planted on him or that those were not recovered from him. To put it differently, fair play and transparency in the process of search has been given the primacy. In Raghbir Singh v. State of Haryana (1996(2) SCC 201), the true essence of Section 50 was highlighted in the following manner:*

"8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22.1.1996 in Manohar Lal v. State of Rajasthan (Cri.M.P.No.138/96 in SLP (Cri.) No.184/1996). One of us (Verma,J.), speaking for the Bench, held :

'It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused.'

9. We concur with the view taken in Manohar Lal's case (supra).

10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the

search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available.

11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, Gazetted Officer or a Magistrate.'

4.As has been highlighted in Baldev Singh's case (supra), it has to be seen and gauzed whether the requirements of Section 50 have been met. Section 50 in reality provides for additional safeguards which are not specifically provided by the statute. The stress is on the adoption of a reasonable, fair and just procedure. No specific words are necessary to be used to convey existence of the right.

5.The above position was elaborately dealt with in Prabha Shankar Dubey v. State of Madhya Pradesh (2003 AIR SCW 6592).”

Applying the principles laid down by the Supreme Court in the above-quoted decisions to the facts of the present case, we find that Section 50 of NDPS Act was completely complied with by Mr.Jani, P.S.I. and there is no breach or violation of the provisions contained in Section 50 of the Act. The evidence of P.S.I. Who had searched the person of the appellant clearly shows that he first explained to the appellant the purpose of his visit to that place. He then told the appellant that he wanted to carry out a search of the person of the appellant. Thereafter he had told the appellant that if he so desired, he could be searched in the presence of a Magistrate or a gazetted officer. The appellant understood very well what he was told. He declined to be searched either in the presence of a Magistrate or a gazetted officer. It may be noticed that while giving statement under Section 313 Cr.P.C. The appellant did not say that he was unaware of his rights or that he was misled on that account in any manner. On the contrary, in general and vague manner it

was only said that no offer as claimed by Mr.Jani was made to him. Though that by itself is not sufficient to convict the appellant in view of the procedural safeguards required to be observed by compliance with the requirements of Section 50, yet this is of some relevance in appreciating the grievance, now sought to be ventilated. It is, therefore, not possible to agree with the contention of the appellant that mandatory requirement of Section 50 was not complied with in instant case. The appellant is not entitled to get any benefit on the ground that breach of the provisions of Section 50 of NDPS Act was committed by the police officer, who searched his person.

10. The second and last submission made by the learned advocate of the appellant that the appellant has not committed offence punishable under Section 21 of the NDPS Act with which he was charged by the learned Trial Judge, as charas found from his possession is not a manufactured drug and, therefore, conviction of the appellant under Section 21 of the NDPS Act is required to be set aside, has no substance. Ms. Hansa Punani, learned A.P.P. has argued that the appellant should be convicted under Section 20 of the Act notwithstanding absence of charge under the said Section in view of the provisions contained in Section 464 of the Code of Criminal Procedure, 1973, as the appellant has failed to establish that failure of justice has resulted in framing of wrong charge against the accused. On perusal of record of the case, this Court finds that initially charge at Exh.2 was framed against the appellant for commission of offence punishable under section 22 of the NDPS Act. During the course of trial, an application was submitted by learned A.P.P. at Exh.19 to amend the charge. It was allowed and, therefore, the charge was subsequently amended by stating that the accused had committed offence punishable under section 21 of the NDPS Act. Thereafter the appellant was tried for commission of offence under Section 21 of the NDPS Act, and after going through the entire depositions and oral as well as documentary evidence, order of

conviction against the appellant came to be recorded under section 21 of the NDPS Act. It is true that *Charas*which was found from the possession of the appellant is neither psychotropic substance nor manufactured drug and, therefore, provisions of Sections 22 &21 of the NDPS Act would not be attracted to the facts of the present case. However, there is no manner of doubt that the provisions of Section 20 of the Act would be attracted to the facts of the present case. The plea that in absence of charge under Section 20 of the Act, the appellant cannot be convicted under the said provision, has no substance. Failure on the part of the learned trial Judge to frame charge against the appellant under Section 20 of the NDPS Act would not vitiate the conviction of the appellant, as we propose to alter and/or substitute his conviction under Section 20 of the Act.

Section 215 of the Code of Criminal Pro, 1973 reads as under :

"*215. Effect of errors: No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. "*

Whereas Section 464 of the Code reads as under :
"*464 . Effect of omission to frame, or absence of, or error in, charge:- (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*

1.If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit;

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

11. In **Dalbir Singh v. State of U.P. (2004)5 SCC 334** the Supreme Court has interpreted the provisions of Section 464 of the Code of Criminal Procedure, 1973. In the said case the appellant was charged under Sections 302, 498-A &304-B of I.P.C., but not under Section 306 I.P.C. It was found that the accused had committed offence under Section 306 I.P.C. While considering the effect of non-framing of charge in respect of offence under Section 306 I.P.C., the Supreme Court has held as under :

"*Having regard to Section 464 Cr.P.C., conviction is possible if (i) the accused was aware of the basic ingredients of that offence, (ii) the main facts sought to be established against him were explained to him clearly, and (iii) he got a fair chance to defend himself.*"

Applying the principles laid down in the said case to the facts of the present case, this Court finds that, (i) the facts sought to be established namely that he was found in possession of charas without pass or permit were explained to the appellant clearly which is quite evident from the charge itself, (ii) the appellant had got a fair chance to defend himself during the course of trial to meet this charge, which is quite evident from the lengthy cross-examination of the witnesses examined by the prosecution, and (iii) the appellant was also aware of the basic ingredients of the offence punishable under section 20 of the Act. Even at the stage of amendment of charge, the appellant had not taken any objection that no charge could be framed against him under Section 21 of the Act, though he had ample opportunity. Section 386 of the Code of Criminal Procedure, which deals with powers of the appellate Court, inter-alia provides that in an appeal from conviction, the appellate Court can alter the finding maintaining the sentence. It is the duty of the appellate Court to apply proper provision of law, to the facts proved. Section 221(1) of the Code of Criminal Procedure, 1973 provides that if a single or series of acts is of such a nature that it is doubtful, which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or

any of such offences or he may be charged in the alternative with having committed some one of the said offences. Sub-section (2) of Section 221, inter-alia, provides that if in such a case the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it. The facts of case on hand would indicate that in view of evidence led by the prosecution, the appellant could have been charged under section 20 of the Act. If the prosecution and the learned Judge had taken a little care, the appellant would have been convicted under Section 20 of the Act. The evidence adduced by the prosecution clinchingly establishes that the appellant committed an offence under Section 20 of the Act, though he was charged with Section 21 of the Act. In view of satisfactory and reliable evidence led by the prosecution, the appellant is liable to be convicted under Section 20 of the Act, although he was not charged with it. Therefore, the finding recorded by the learned Judge of the trial Court that the appellant is guilty under Section 21 of the Act is liable to be altered to one that he is guilty under Section 20 of the Act. The net result of above discussion is that the appeal has no substance and will have to be dismissed.

For the foregoing reasons, the appellant is convicted under Section 20 of the NDPS Act instead of under Section 21 of the Act as convicted by the trial Court. The sentence imposed by the trial Court on the appellant is hereby confirmed. The appeal fails and is dismissed. Muddamal to be disposed of as per the directions given by the learned trial Judge in the impugned judgment.

(J.M.Panchal, J.)

(H.B.Antani, J.)

(patel)